C-E Cast Equipment-Furnace Systems, a Division of Combustion Engineering, Inc. *and* Gerald Sementilli. Case 4-CA-11300

February 26, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On August 20, 1981, Administrative Law Judge Norman Zankel issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his remedy[2] and his recommended Order, as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, C-E Cast Equipment-Furnace Systems, a Division of Combustion Engineering, Inc., Burlington, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b):

"(b) Discriminating against any of its employees by discharging them because they engage in union activities."

2. Substitute the attached notice for that of the Administrative Law Judge.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Although sec. II,A,(1), par. 9, of the Administrative Law Judge's Decision states that "Cossey claimed [that he and Gadoury, Respondent's production superintendent,] spoke of the employees' current efforts to investigate union representation," the record does not so reflect. Despite this error, the Administrative Law Judge correctly concluded that Respondent had no direct knowledge of union activity, but that such knowledge was properly inferred based upon Gadoury's agreement to meet with the employees to discuss or iron out shop problems, Gadoury's June 28 and July 9, 1980, threats to fire the employees and close the Burlington facility in the event of unionization, the likelihood that Gadoury's wife would have told Gadoury of her knowledge that the employees had voted to bring in a union, and the fact that the employees' protected activities could not have escaped Gadoury in view of the small employee complement. In addition to these factors, we also note that the employees openly discussed the issue of their possible unionization and, on June 27, 1980, during their lunch hour taken in Respondent's parking lot, openly voted to unionize Respondent's Burlington facility. Additionally, we find it unnecessary to rely on the Administrative Law Judge's analysis of Gadoury's character and management style in order to sustain a finding of knowledge.

Chairman Van de Water and Member Hunter do not adopt any implication by the Administrative Law Judge that *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), is inapplicable to so-called pretext cases. Rather, they agree with his statement that ". . . whatever characterization may be attached to the case at bar, the analysis of the Section 8(a)(3) issue remains constant." Thus, the Administrative Law Judge's findings and conclusions herein fully satisfy the analytical objectives of *Wright Line*.

Member Jenkins finds it unnecessary to rely on *Wright Line, supra*, in reaching the conclusion that Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging Calp, Cooke, Cossey, Lane, and Sementilli. Because the Administrative Law Judge specifically found that no dual motive is presented by this case and determined that Respondent's asserted reasons for dismissing these employees is a pretext, application of the *Wright Line* analysis in these circumstances serves merely to confuse rather than to clarify the rationale.

Finally, we note that, in sec. II,C,2, par. 28, of his Decision, the Administrative Law Judge inadvertently refers to the date of Respondent's discharge of certain of its employees as September 16. We hereby correct the Decision to reflect that the date of such discharge was June 16.

[2] We note that no exceptions were filed to that portion of the Administrative Law Judge's recommended remedy that Respondent provide each of discriminatees herein with a letter of recommendation.

Member Jenkins would compute interest on the backpay due the five discriminatees in accordance with the formula set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

Accordingly, we give you these assurances:

WE WILL NOT threaten to discharge you nor threaten to close our plant in order to discourage you from engaging in union activities.

WE WILL NOT discriminate against any of you by discharging you because you engage in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the free exercise of any of the rights described at the top of this notice.

WE WILL make whole, with interest, Melvin Calp, Ron Cooke, David Cossey, Gary Lane, and Gerald Sementilli for all money lost as a result of our having discriminatorily discharged them on July 30, 1980.

WE WILL establish a preferential hiring list and, in a nondiscriminatory manner such as seniority, place the names of the above-named employees on it, and, if we resume our production operations in the area of Burlington, New Jersey, WE WILL offer reinstatement to them, in the order their names appear on such list, to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs.

WE WILL delete from all our official records all references to the fact that each of the above-named employees had been discharged on July 30, 1980, or in any other way had their employment terminated by involuntary means.

WE WILL deliver a letter of recommendation to each of the above-named employees which will indicate their jobs and length of service with us, that their work was satisfactory, and that they would be rehired by us if they should apply and we resume our production operations in the Burlington, New Jersey, area. Such letters of recommendation shall contain no reference whatsoever to the unfair labor practice proceedings, nor shall they contain anything to indicate that the above-named employees' termination of employment was anything but voluntary.

C-E CAST EQUIPMENT-FURNACE SYSTEMS, A DIVISION OF COMBUSTION ENGINEERING, INC.

DECISION

STATEMENT OF THE CASE

NORMAN ZANKEL, Administrative Law Judge: This case was heard on May 6, June 30, and July 1, 1981, at Philadelphia, Pennsylvania.

Upon an original charge filed on August 5, 1980,[1] by Charging Party Sementilli, the Regional Director for Region 4 of the National Labor Relations Board issued a complaint and notice of hearing on September 24.

In essence, the complaint alleges the Employer interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, when, on June 28 and July 9, it issued threats of discharge and plant closure.[2] Additionally, the complaint alleges the Employer discriminated against its employees in violation of Section 8(a)(3) and (1) of the Act when it discharged employees Gary Lane, Melvin Calp, Ron Cooke, David Cossey, and Sementilli on July 30.

The Employer filed a timely answer which admitted certain matters but denied the substantive allegations and that it had committed any unfair labor practices.

All parties appeared at the hearing. Each was represented by counsel and was afforded full opportunity to be heard, to introduce and meet material evidence, to examine and cross-examine witnesses, to present oral argument, and to file briefs. Counsel for the Board's General Counsel and the Employer's counsel filed briefs on August 4, 1981. I have carefully considered the contents of those briefs.

Upon consideration of the entire record, the briefs, and my observation of the witnesses and their demeanor, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Jurisdiction is uncontested. The Employer's answer admits, and I find, that the Employer, at all material times, has been a Delaware corporation.

At all times material herein, the Employer maintained a facility at Route 130, Burlington, New Jersey.[3] At that facility, the Employer was engaged in the manufacture of furnace systems.

During the 12-month period immediately preceding issuance of the complaint, a representative period, the employer purchased and received materials valued in excess of $50,000, at its Burlington facility directly from points outside of New Jersey.

Upon the foregoing, the Employer's admission, and the record as a whole, I find the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[4]

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[1] All dates hereinafter are 1980, unless otherwise stated.

[2] In his post-trial brief the General Counsel moved to amend complaint par. 4(a). Said unopposed motion seeks to add the words "and plant closure" to the existing allegation that the Employer threatened employees with discharge on July 9. As will be reflected, *infra*, all parties fully litigated both the matter of the discharge threat and plant closure. In view of this, it is permissible to find, even *sua sponte*, that violations have occurred based upon such fully litigated matter. *Keystone Pretzel Bakery, Inc.*, 242 NLRB 492, fn. 2 (1979). Thus, and because I conclude the amendment is clearly related to the subject matter of complaint par. 4(a), the alleged threat to close having occurred in the context and conversation involving the alleged discharge threat, the General Counsel's motion to amend is granted. *Bighorn Beverage*, 236 NLRB 736, 751-752 (1978), and cases cited herein.

[3] The parties stipulated that the production activity at the Burlington, New Jersey, facility ended approximately December 31.

[4] The complaint contains no allegation that any entity is a labor organization within the meaning of the Act. Thus, no finding is made in this connection.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Credibility*[5]

Resolution of the credibility of the respective witnesses for the opposing litigants is critical to determination of the instant issues. Such determination creates the underpinning of my findings of fact.

My credibility determinations are based on my observation of witness demeanor, unrefuted testimony, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole. *Northridge Knitting Mills, Inc.*, 223 NLRB 230 (1976); *Warren L. Rose Casting Inc., d/b/a V. & W. Castings*, 231 NLRB 912, 913 (1977); *Gold Standard Enterprises, Inc.*, 234 NLRB 618 (1978).

In the credibility contest between the witnesses presented by the General Counsel and those on behalf of the Employer, a fair assessment of the testimony presented by each persuades me the versions presented by the General Counsel's witnesses are the most reliable. I find the following specific, but not exhaustive, elements impressive indicators of the respective reliability of the witnesses.

The General Counsel presented each of the alleged discriminatees, plus Linda Cossey (the wife of alleged discriminatee Cossey) as witnesses.[6]

Three people were presented as witnesses for the Employer. Two of them, Production Superintendent Serge Gadoury and General Manager Stephen H. Hamilton, were statutory supervisors at all material times. Charles Johannes, the Employer's third witness, had been employed as a production employee as a welder at the Burlington facility for approximately 1-1/2 to 2 years before the production operation was closed at the end of 1980.

The testimony which was contested consisted of what occurred at (1) a June 21 picnic attended by the Burlington employees at Gadoury's home;[7] (2) subsequent conversations among employees; (3) conversations between the Cosseys and Gadoury; (4) what occurred around the timeclock on July 9; and (5) an incident involving a flat tire on the automobile of one Hufnagel[8] on July 30, the date the Employer admittedly discharged each of the alleged discriminatees.

There are a number of objective factors in the record which I have utilized, in addition to witness demeanor, to make the necessary credibility determinations. These factors follow:

1. Testimony regarding events at Gadoury's home

It is undisputed that, on June 13, Sementilli, Cooke, and Calp punched out early. Upon their return from lunch, these individuals saw that Gadoury, their supervisor, was absent from the premises. They unilaterally decided they need not work because of lack of supervision. When Gadoury learned of their actions, he discharged each of them on June 16. Although they had been discharged, it is undisputed each attended, and was welcomed at, the June 21 picnic.

Each of the five alleged discriminatees herein testified they talked among each other about an apparent need for a union to preserve or enhance job security. These witnesses asserted this conversation occurred in the context of reviewing the implications of the June 16 discharges.

Each employee witness also testified that two additional informal meetings were held among them on June 26 and 27. It was asserted other employees who were not involved in the June 21 discussions at the Burlington facility during lunch or breaktimes participated in the later discussions. All agreed that, on June 27, they voted to seek out a union.

Gadoury unequivocally denied having any conversation concerning a union at the June 21 picnic. However, Ms. Cossey attended the picnic. She is an executive board member and officer of AFSCME, an International office workers labor organization. (Her father is also an officer of a local union of AFSCME.) Ms. Cossey testified she spoke with Gadoury about a union at the picnic. Ms. Cossey claimed she told Gadoury she thought the June 16 discharges were unfair and that Gadoury was wrong in terminating the three employees. It is undisputed that Gadoury decided to reinstate Sementilli, Cooke, and Calp, and did so during the picnic. Ms. Cossey testified she told Gadoury she believed the employees needed a union. According to Ms. Cossey, Gadoury rejected that idea by saying that unions were "a big pain in the a—, and wanted nothing to do with them."

It is undisputed that Ms. Cossey, Gadoury, and Cossey maintained an active social relationship. They had gone "duning" together in a four-wheel-drive vehicle about 12 times and also visited one another's house.

One such house visit occurred on June 28. Ms. Cossey testified extensively, articulately, and comprehensively concerning a conversation she had with Gadoury on June 28. Interestingly, Gadoury was asked few questions concerning this social visit.

Ms. Cossey testified she and Gadoury had another union conversation on June 28. Ms. Cossey asserted she told Gadoury that there are unions which would not hurt the Employer. According to Ms. Cossey, Gadoury maintained he had no use for unions. Specifically, Ms. Cossey recounted, in specific terms, Gadoury's elaboration on this subject. Thus, Ms. Cossey claimed that Gadoury said the Employer maintained the Burlington facility as a tax writeoff. Gadoury is supposed to have said that there is union representation at the Employer's Cleveland, Ohio, location and that it is a "pain in the a—." Additionally, Ms. Cossey testified Gadoury said "if a

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[5] All witnesses, including Charging Party Sementilli, were sequestered throughout the proceedings, by agreement between the counsel for the General Counsel and the Employer's counsel.

[6] Hereafter, Cossey's wife will be identified as Ms. Cossey and the alleged discriminatee, as Cossey.

[7] Other picnics, which were attended by Burlington employees, had been previously held at homes of a variety of other employees. The Employer did not sponsor or pay for the picnics. Rather, each participant contributed something appropriate.

[8] Hufnagel performed services for the Employer under contract, not as a regular production employee. At the time of the incidents material herein, Hufnagel was assigned duties as stockroom attendant.

union comes in here [Burlington], the Employer would close the Burlington facility and move to Cleveland."[9]

Ms. Cossey also testified that, on June 28 (the day after the alleged discriminatees claimed they voted to look into a union) she told Gadoury's wife that the employees had already voted to seek union representation and they were looking into the matter.[10]

Cossey also testified he participated in union conversation with Gadoury on June 28 at Gadoury's house. Thus, Cossey claimed they spoke of the employees' current efforts to investigate union representation. Cossey asked whether Gadoury would meet with the employees to discuss their problems. Gadoury assented. (Such a meeting was not actually conducted.) Cossey's version of the plant closure remark was that Gadoury said if the Union came in the Employer would "shut down—everyone would be fired—and the Employer would move to Cleveland."

It is undenied that there is union representation at Cleveland. Also, Gadoury admitted he personally felt there was no need for a union at Burlington.

As noted, Gadoury unequivocally denied the critical matters attributed to him. Employer witness Johannes was produced apparently to refute the claim that any union discussion occurred during the picnic. However, I conclude Johannes' testimony does not accomplish this purpose. Thus, though Johannes testified (during direct examination) he heard no union talk at the picnic even though he was present during conversations held among the alleged discriminatees, he nonetheless acknowledged he entered the conversations after they began and left before the conversations ended.[11] Thus, Johannes did not effectively demonstrate the union conversations did not occur as the other employees claimed. He, admittedly, simply was not present during the entirety of the conversations among the alleged discriminatees.

Moreover, Johannes was evasive when testifying about the picnic. During his direct examination, Johannes was asked:

> Q. And during the course of this time (the conversation among other employees which Johannes admittedly attended for some time) . . . was there any discussion that you heard by anyone about forming a union or unions in general?

Johannes responded: "No, I didn't hear anything." The interrogation continued:

> Q. I'm sorry, you said you didn't hear anything?
>
> JUDGE ZANKEL: You'll have to answer loud, please? Say yes or no.
>
> A. No, I didn't hear no talk about nothing.

I consider the above transcript abstract demonstrative of an effort to avoid testimonial entanglement in a situation calling for a straightforward reply. Not only does it show a reluctance to be candid but it also defies probability. It is incredulous that Johannes was present for some part of the conversation but heard absolutely nothing. Even if believed, Johannes' ability to support the Employer's position is vastly diminished. If he truly heard nothing, his assertions there was no union talk lack probity.

Johannes' inclination toward evasion was demonstrated in yet another way. He was called to testify as a "surprise" witness. During direct examination, Johannes testified he first spoke with the Employer's attorney, Kehoe, the Employer's general manager, Hamilton, and Gadoury[12] on the night immediately before he testified. When questioned by counsel for the General Counsel, Johannes denied he discussed the things on which he would give testimony with Kehoe, Hamilton, or Gadoury. Instead, Johannes merely asserted those Employer representatives advised him they wanted him to be a witness and told him to tell the truth. When questionned from the bench, Johannes maintained that Kehoe and Hamilton simply asked him to come into court and testify. However, Johannes then wavered regarding his conversation with Gadoury. Thus, Johannes finally acknowledged he had a "little talk" with Gadoury; and that they talked about "what happened" concerning at least one of the events which was the subject of his testimony. I consider this reluctance of Johannes to be candid detracts from his overall credibility.

On another matter, Johannes actually corroborated the testimony of the alleged discriminatees. Thus, regarding the Cossey's testimony they told Gadoury, on June 28, that the employees had voted for a union, Johannes testified that he was present and voted during the June 27 vote claimed by each of the alleged discriminatees to have been held.

In sum, wherever Johannes and the General Counsel's witnesses testified on the same subject, I find Johannes less reliable.

I conclude the composite of the General Counsel's witness' testimony is chronologically and substantively logical. Principally, Ms. Cossey, Lane, and Cossey presented comprehensive and forthright descriptions of what occurred. Their testimony is internally consistent. Particularly impressive is Ms. Cossey's description of what Gadoury is supposed to have said regarding the Employer's use of Burlington as a tax writeoff as justifying possible closure and plant relocation. Her account was extremely specific and lucid. She described material which plausibly would be spoken by one in Gadoury's managerial capacity. The content of Ms. Cossey's narration of this subject is sufficiently specific to remedy it unlikely she had concocted it. Indeed, Gadoury was not at all asked to even deny such a conversation occurred

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[9] As will be noted, *infra*, Gadoury was asked whether he made this statement regarding plant closure *during the picnic* on June 21. He unequivocally denied making such a remark. However, he was not asked to deny whether or not he made this statement *on June 28* as asserted by Ms. Cossey.

[10] Ms. Cossey further testified Gadoury's wife said she did not want to be the one to tell Gadoury.

[11] Lane, Cossey, and Sementilli claimed Johannes was present during union discussion among employees at the picnic. In view of Lane's and Cossey's generally more comprehensive narration, Johannes' more selective account, the degree to which the latter provided testimony corroborating the General Counsel's witnesses, and the neutralizing effect of Johannes' testimony upon its adverse intent, I credit the General Counsel's witnesses over Johannes wherever their testimony conflicts.

[12] Hamilton and Gadoury also testified

or that the substance of it described by Ms. Cossey was inaccurate. Similarly, apart from making his unequivocal self-serving denials of issuing the alleged unlawful threats, Gadoury was not specifically asked to describe what conversation he had with Cossey on June 28. Cossey's account was extensive and forthright.

I find the testimony of the other alleged discriminatees mutually corroborative, in material respects, with that of each of the other General Counsel witnesses.

In contrast, Gadoury's testimony was more stacatto, pervaded with self-serving denials and, in some regards, he made no effort whatsoever to refute the testimony of the General Counsel's witnesses.

In general, I conclude the scenario of events described by the General Counsel's witnesses should be credited. It is logical that the three discharges on June 16 would have stimulated union discussion. The opportunity to do so was conveniently presented at the June 21 picnic. Gadoury's reinstatement of the three dischargees during the picnic lends credence to the assertion he was involved in discussion with at least some of the alleged discriminatees. Their candid and direct testimony of what was said while Gadoury was present is plausible. Such conversations naturally flow from the context of the earlier discharges.

Ms. Cossey was an especially impressive witness. Given the social relationship between her and Gadoury, it is reasonable she would have discussed the June 16 discharges with Gadoury during the June 21 picnic.

I find it logical and plausible that the employees would want to meet again to further discuss possible union representation, once having initiated such discussion on June 21. Thus, I credit all the testimony which indicates that such meetings were held on June 26 and 27. During those meetings, the record shows most, if not all, of the other employees were involved in union discussion. The vote, assertedly taken on June 27, looms as a natural consequence of such discussion.

That the Cosseys and Gadoury met socially on June 28 is undisputed. In the backdrop of the aforementioned employee efforts regarding a union, and the friendly relationship between the Cosseys and Gadoury, it is difficult to believe, as claimed by Gadoury's unequivocal denials, that the subject matter would not have been raised on June 28, as described by the Cosseys. Thus, I credit their testimony in full regarding what occurred on June 28, especially because Gadoury's direct examination virtually omitted any reference to those events.

Accordingly, the description of facts, *infra*, is predicated on my conclusions that each of the General Counsel's witnesses is more credible and reliable than those of the Employer regarding the events up to, and including, June 28.

2. Johannes' testimony is not a persuasive factor favoring the Employer's cause

In addition to the aspects of Johannes' testimony described above, there are other noteworthy elements pertinent to the credibility resolutions.

One of the alleged 8(a)(1) violations, as amended, is predicated on an alleged threat by Gadoury on July 9 to discharge the employees and close the plant if they formed a union.

Lane testified that on July 9 Gadoury was standing around the timeclock at the end of the workday. There, Gadoury is supposed to have repeated his remark that, if a union came in the shop, the Employer would "close and move to Cleveland"; Cossey testified Gadoury repeated that remark; Calp testified Gadoury said the employees would be "all fired" and the Employer would move to Clevaland; and Cooke said Gadoury told them the Employer would "pack down and move."[13]

Johannes' testimony regarding the alleged July 9 incident does not assist the Employer. Johannes exhibited a faulty memory concerning what occurred on July 9. His testimony reflects he had a faint and generalized recollection of the incident. Accordingly, I cannot rely on Johannes for the purpose, proposed by the Employer, of rebutting the more direct and sure descriptions presented by the General Counsel's witnesses.[14]

Finally, Johannes was produced to testify concerning the events of July 30, the date of the discharges alleged herein to be discriminatory. As will be further explained, *infra*, the discharges were imposed assertedly because none of the five alleged discriminatees would implicate any other as the perpetrator of physical damage to a wheel on the automobile of employee Hufnagel. Thus, Johannes testified he saw Cossey walk past him with a pair of pliers in his hand on the morning of July 30. However, Johannes expressly testified he did not report what he had purportedly seen either to Gadoury or Hufnagel before the alleged discriminatees had been interviewed by Gadoury on July 30 and discharged. Moreover, Gadoury testified he asked Johannes for information concerning the flat tire on Hufnagel's car before confronting the alleged discriminatees. Yet, Gadoury testified that Johannes did not mention he had seen Cossey with the pliers. If Johannes' July 30 testimony has any value, it diminishes, rather than enhances, his veracity. Gadoury's claim that he gave Johannes an opportunity to describe what he knew, but did not do so, casts doubt on Johannes' claim that he actually saw Cossey with the pliers that day.

Upon all the foregoing, I conclude that none of Johannes' testimony effectively detracts from the otherwise credible nature of the testimony presented by the General Counsel's witnesses who testified on the same subject matter.

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[13] Cross-examination of these witnesses on this subject was extensive. This fact shows the issues of both the discharge and plant closure threats were fully litigated.

[14] I reject the Employer's claim the General Counsel's witnesses should be discredited because of disparities in their recollection of which employees were present at the timeclock on July 9. I view their consistent recount of the alleged threats to discharge and close the plant more significant and probative. Those accounts were considerably more sure and certain than Johannes'. The testimonial variations among the General Counsel's witnesses regarding the precise words Gadoury allegedly used, and as to who was present, are regarded as natural inconsistencies which flow from the passage of time between event and testimony, and tend to provide credible spontaneity to such testimony.

3. There are areas where no effort was made by the Employer to contradict the General Counsel's witnesses in specific terms

As an example, Lane testified that, during the July 30 termination interview, Gadoury referred to the alleged discriminatees as "ringleaders." Though Gadoury testified at length concerning what occurred during the termination interview, he was not asked to deny that he used the "ringleader" term ascribed to him.

Also, Ms. Cossey, in amplification of her testimony that Gadoury explained to her, on June 28, that the Burlington facility was a tax writeoff, claimed he showed her "portfolios" which looked to her like "share profiting books." Gadoury gave scant testimony regarding the June 28 conversation. Notably, he was not asked to deny Ms. Cossey's explicit description of what occurred. Thus, I consider that her testimony stands uncontradicted in material respects.

I have already noted above, regarding the alleged threat to close the plant, that Gadoury was asked whether or not he made such a statement at the June 21 picnic. However, no General Counsel witness claimed the statement was made on that date. Instead, that threat was attributed to him on June 28. Gadoury was not asked whether he made the statement on the later date. Accordingly, I consider the testimony he made a threat to close the plant on June 28 uncontroverted.

4. The Employer failed in its efforts to discredit the General Counsel's witness

In a patent effort to elicit admissions which would tend to discredit the alleged discriminatees, the Employer's counsel asked Lane whether he told employee Lopez, a nonexempt serviceman, that he (Lane) would "get" Gadoury one way or another. Calp was asked whether he had said such a thing to Lopez or whether he heard anyone else making such a comment. Cooke also was asked whether he heard this remark had been made to Lopez.

Lane denied he ever said such a thing to Lopez; Calp denied he said this and that he heard anyone else do so; and Cooke had no recollection of such a statement.

Lopez did not testify. His absence was unexplained. The record does not reflect that Lopez was in the control, or an agent, of either of the litigants. His absence well may be due to the fact his whereabouts were unknown at the time of the hearing. For this discussion, I assume Lopez' employment terminated when the Burlington facility closed at the end of 1980. Accordingly, I draw no inference from Lopez' failure to testify.

However, I consider the Employer's persistent effort to extract the adverse admission of personal animosity of the employees toward Gadoury an appropriate factor in assessing overall credibility. Lopez' failure to testify is of no great import. More significant is the consistency of the denials provided by Lane, Calp, and Cooke. Each was spontaneous and straightforward in his response to the Lopez' questions. There is no evidence that any of these three witnesses knew, at the time they made their responses, that Lopez would not appear as a witness. This factor is some assurance of their reliability. Thus, I credit each of their denials, without consideration of Lopez' absence.

Contrary to the Employer's contention, I find no basis for concluding there is a collusive character to the testimony of the General Counsel's witnesses.

During the hearing the Employer's counsel contended, at least by implication, that the testimony of the General Counsel's witnesses was rehearsed and collusive. That assertion is continued in the Employer's post-trial brief. In one place, it is argued the alleged discriminatees testified "in locked step."

I concede the existence of some indicators which might detract from the credibility of some of the General Counsel's witnesses. This is true only if viewed in isolation. Thus, Lane's testimony regarding the employee meetings of June 26 and 27 was elicited by extremely leading questions. Nonetheless, I find sufficient support by other General Counsel witnesses (and even Johannes) for discounting the leading character of Lane's direct examination. Specifically, Lane did independently recall the employees had voted to begin a unionization process. This testimony was confirmed by each witness, including Johannes, who testified on that subject.

Cossey's testimony regarding the picnic was wholly spontaneous. However, his narration of the July 9 timeclock incident varies somewhat from the other General Counsel witnesses, I find these variations relate to which employees were present at the timeclock and other incidental matter. On the material issue of Gadoury's alleged threat, Cossey's testimony is clear and certain and is consistent with other General Counsel's witnesses.

Cooke's testimony was generally disjointed. It contains many leading questions. He exhibited confusion in some of his responses. Particularly, his recollection *of dates* was abyssmally poor. As to the July 9 incident, however, Cooke was positive and sure. He recalled, during direct examination, that Gadoury threatened to close down. Moreover, Cooke was resolute in this testimony during cross-examination. In fact, the record reflects his testimony was consistent with his pre-trial affidavit. He was attacked only upon his recollection of the date upon which the event occurred.

I do find the precise remarks each alleged discriminatee attributed to Gadoury as a threat to contain variations. These variations do not effectively detract from the witnesses' credibility. They are sufficiently different to conclude, as I do, that the versions presented by these witnesses were unrehearsed. In some instances, the General Counsel's witnesses testified, *in haec verba*, as others as to the words Gadoury used. Such confluence does not necessarily diminish witness credibility. The similarity in testimony is equally susceptible to a conclusion the words attributed to the speaker actually were used, as to a conclusion that there exists some testimonial conspiracy.

In sum, I find that there are considerable discrepancies in dates and recollection of the people who attended the various events. I conclude these differences are not enough to adversely affect the otherwise credible accounts of the General Counsel's witnesses. This is true especially when balanced against the internal consistency

and inherent probability of their testimony, the partial corroboration of their accounts by the Employer witnesses, and the sometimes uncontroverted character of their testimony.

5. Johannes' testimonial independence is questionable

The Employer claims Johannes is more credible than the General Counsel's witnesses because he "has no affiliation or allegience" to the Employer.[15] The record does not support this proposition. Thus, Johannes testified he worked at the Burlington facility until it closed in December 1980. He later indicated he "got" the job at which he was working at the time of hearing "through" Gadoury. Johannes further testified he had been employed in that position for about 6 months. Clearly, the job at which he worked when testifying was a replacement position for that which he held with the instant Employer. Considering Johannes' length of service at his new job, it appears Gadoury took immediate steps upon the closing of the Burlington facility to assist Johannes in obtaining new employment.

The above-described situation tends to negate the Employer's claim that Johannes was a disinterested witness. Nonetheless, I do not consider the possibility Johannes has a reason to be loyal toward Gadoury or the Employer dispositive of his credibility. I have not entirely, however, discounted this factor as an element in making my credibility evaluations. Greater weight has been accorded the other factors, earlier described, involving Johannes' reliability as a witness.

Upon all the foregoing, I find each of the General Counsel's witnesses more credible and reliable indicators of what actually occurred than Gadoury or Johannes[16] and credit the former wherever conflicts exist.

B. *The Facts*

The recitation of facts below is a composite of relevant unrefuted oral testimony, the credited testimony, supporting documents, and other undisputed evidence. Not every bit of evidence is discussed. Nonetheless, I have considered all of it together with oral arguments of counsel. Omitted matter is considered irrelevant or superfluous.

At all material times the Employer operated its Burlington facility where, during June and July 1980, approximately 10 employees (among whom were the 5 alleged discriminatees) had been employed in production jobs. Gadoury was their direct supervisor. Gadoury reported to Hamilton.

As earlier indicated, Sementilli, Calp, and Cooke were discharged because they left work early on June 13 without permission. Nonetheless, they attended the June 21 picnic at Gadoury's house.

On June 21, the picnic was held as indicated.[17] Based on the aforesaid credibility resolutions, I find the alleged discriminatees, using the June 16 discharges as their focal point, discussed the need for greater job security. There is no direct evidence that Gadoury either participated in such discussions or was informed of them by any of the participants.

Gadoury, however, did have a conversation with Ms. Cossey at the picnic. She told Gadoury the June 16 discharges were unfair and he was wrong in discharging Sementilli, Calp, and Cooke. Gadoury reinstated them during the picnic. Further, Ms. Cossey told Gadoury she believed the employees needed a union. Gadoury responded that unions were "a big pain in the a—." Gadoury told Ms. Gadoury he wanted nothing to do with unions.

Meanwhile, the alleged discriminatees who discussed their employment situation at the picnic decided to meet with other employees to develop a consensus.

Another meeting among employees took place on June 26. It occurred during breaktime in the Employer's parking lot. Most of the production employees attended. They favored union representation.

On June 27, the employees held another meeting. This was during the lunch hour. A discussion concerning unions ensued. All present, including Johannes (a total of about eight employees), voted to try to bring a union into the shop. Cossey was designated to make efforts to contact some labor organization for that purpose .

On June 28, the Cosseys were at Gadoury's home. There, Ms. Cossey engaged Gadoury in union discussion. Ms. Cossey presented sympathetic views on unionization. Gadoury claimed the Union representing employees at the Employer's Cleveland, Ohio, location was a "pain in the a—." Based on Ms. Cossey's undenied testimony, I find that Gadoury told her "if a union comes in here . . . the Employer . . . would close the Burlington facility and move to Cleveland."

During the June 28 discussions at Gadoury's house, Cossey expressed concern over Gadoury's unpredictability in treatment of the employees and pointed out that there were a variety of problems in the shop. Gadoury indicated he would meet with the employees the following Monday.

Cossey credibly testified he asked Gadoury what would actually happen if there were a union in the shop. According to Cossey, Gadoury responded, "if a union was brought into . . . the Employer . . . that everybody would be gotten rid of and the place would shut down. It's as simple as that. It would shut down and him [Gadoury] and Hamilton would go to Cleveland. That had already been pre-arranged."[18]

Further, on June 28, Ms. Cossey continued her discussion with Gadoury about unions. It was then that Gadoury informed Ms. Cossey of the position of the Burlington facility as a tax writeoff.

After leaving Gadoury's home on June 28, Cossey traveled to a shopping center. He accidently encountered Lane. Cossey told Lane that Gadoury had agreed to meet with the employees the following Monday to "iron

[15] Employer's br., p. 5.

[16] Hamilton was not involved in critical matters.

[17] The salient occurrences of that date have already been described, *supra.*

[18] As previously observed, Gadoury was not asked specifically to refute the details of Cossey's June 28 narration.

out" their problems.[19] As earlier indicated, no such meeting was held.

At the regular punchout time on June 9, a number of employees stood around the timeclock. They were waiting to punch out after their shifts. It is not totally clear precisely which of the employees were there. The General Counsel's witnesses testified that Gadoury threatened that all the employees would be fired, and the plant would close and move to Cleveland if a union came in the shop. I credit such testimony for the reasons previously stated,[20] although Gadoury denied he made those remarks and Johannes said he had not heard them.[21]

Thereafter, Lane pursued a resolution of the employees' problems. Thus, around July 16, Lane testified without contradiction that he asked Gadoury why the meeting he promised the employees had not yet been conducted. According to Lane, Gadoury answered he had been too busy but would conduct the meeting at a later time.

Unrefuted testimony by Gadoury involves a report by Hufnagel to him made on July 29.[22] Apparently, one of Hufnagel's jobs was to maintain the Employer's premises in clean condition. On July 29, Hufnagel complained to Gadoury that there were broken beer bottles in the shipping area. Gadoury confronted all the employees when they punched out that day. He reprimanded them for breaking the bottles. He warned them of rescission of their beer-drinking privileges.[23]

On July 30, Lane, Cossey, Calp, and Sementilli took their 9:30 a.m. regular break together. They were in the parking lot. There, they noticed that a tire on Hufnagel's automobile was flat.

Hufnagel reported to Gadoury that someone had pulled the valve stem from the tire of his car. Hufnagel threatened to quit.[24]

Gadoury then called Cossey, Calp, Cooke, Lane, and Sementilli into his office. Gadoury informed them that someone pulled Hufnagel's valve stem from one of his tires. Gadoury told these employees he wanted one of them to come forward with information as to who was the culprit or admit that he had himself done the damage. During this conversation, Gadoury referred to these employees as "ringleaders," as reported, *supra*.

The employees stood mute. Gadoury repeated his request for information. This request was resisted. Cossey commented, "[I]t was about time somebody got back at . . . [Hufnagel]" and Lane asked whether Gadoury actually wanted him to "rat on" others.

Gadoury decided to, and did, discharge each of the alleged discriminatees on the spot. He claimed the discharge was for their failure to provide any information.

Each of the alleged discriminatees testified he had not pulled the valve stem. The Employer presented no evidence to show who perpetrated the damage.

C. *Analysis*

1. Interference, restraint, and coercion

In complaint paragraph 4(a) it is alleged the Employer violated Section 8(a)(1) of the Act when Gadoury threatened, on July 9, to discharge the employees and close the plant; and in complaint paragraph 4(b) that the same violation occurred when Gadoury issued the same threats on June 28, all in the event the employees selected a union.

The Board's test for 8(a)(1) conduct is whether it reasonably tends to interfere with, restrain, and coerce employees in the exercise of their statutory rights. *Keystone Pretzel Bakery, Inc.*, 242 NLRB 492 (1979), citing *Hanes Hosiery, Inc.*, 219 NLRB 338 (1975).

The credited versions of the testimony presented by Cossey and Ms. Cossey over the bare denials of Gadoury reveal that he, in fact, did tell Cossey that if the Union came in the Employer would shut down, move to Cleveland, and "every one" would be fired.

Also, the credited composite versions of the testimony of the alleged discriminatees show that Gadoury said the same things at the timeclock on July 9.

No evidence was presented to show Gadoury's remarks constituted a permissible prediction. See *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1968). A threat of plant closure has the reasonable tendency to interfere with the employees' rights, unless such an event is a demonstrably probable consequence of unionization. *726 Seventeenth, Inc., t/a Sans Souci Restaurant*, 235 NLRB 604 (1978).

"It is a clear violation of the Act for an employer to threaten to close its place of business if its employees choose representation by a union." *N.L.R.B.* v. *Buckhorn Hazard Coal Corporation*, 472 F.2d 53, 55 (6th Cir. 1973). "Such a reference to a threatened closure has uniformly been considered the type of interference . . . whose effects are severe and linger on after they had been made." *Axton Candy and Tobacco Company*, 241 NLRB 1034, 1035 (1979).[25] A threat of plant closure is one of the most serious threats an employer can make. *Pay'N Save Corporation*, 210 NLRB 311, 321 (1974).

With respect to the threats issued by Gadoury to Cossey on June 28, it is no defense that they were social friends or that the incident occurred at Gadoury's home. It is well established that conduct violative of Section 8(a)(1) is rendered no less unlawful if committed or made in a friendly or even joking manner. *Conagra, Inc.*, 248 NLRB 609 (1980); *Ethyl Corporation*, 231 NLRB 431 (1977).

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[19] That Monday was June 30.

[20] See sec. II,A, *supra*.

[21] The record reflects that no discussion involving unionization occurred between any employee and Gadoury between June 28 and July 19 because the employees were waiting for Gadoury to hold a meeting with them as he offered on June 28.

[22] All witnesses, including Johannes, agreed Hufnagel was not considered by the production workers as a fellow employee. He had been a contract laborer, and, during the relevant events, was working in the supply room. The parties stipulated that the Employer's records do not reflect Hufnagel as an employee.

[23] To the extent my adoption of Gadoury's testimony relative to July 29 is inconsistent with my earlier findings that Gadoury is generally not credible, such division of credibility resolution is permissible. A trier of fact is not required to believe the entirety of a witness' testimony. *Maximum Precision Metal Products, Inc., Renault Stamping Ltd.*, 236 NLRB 1417 (1978).

[24] In fact, Hugnagel did quit later that day because, according to Hamilton, Hufnagel "just couldn't take anymore of this harassment."

[25] Though the *Axton* case arose in a context different from the instant situation, the legal principle is equally applicable herein.

No exhaustive analysis is necessary to show that the threats of June 28 and July 9, that the employees would be discharged or fired if a union came into the shop, reasonably tends to have the proscribed effect on employees' Section 7 rights.

Upon all the foregoing, I find that a preponderance of the credible evidence sustains the allegations contained in complaint paragraphs 4(a) and (b), as amended.

2. Discrimination

In *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the Board declared that in dual-motive cases the General Counsel must first prove the existence of a *prima facie* case showing the alleged discrimination was motivated by antiunion considerations. Thereafter, the burden of proof shifts to a respondent to demonstrate that it would have taken the action alleged as discriminatory, even in the absence of the employees' protected activity. The test of causality applied by the Supreme Court in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), was adopted by the Board.

Recently, the Board has indicated the same test may apply to so-called pretext cases. *Limestone Apparel Corp.*, 255 NLRB 722, 723 (1981). See also *Castle Instant Maintenance/Maid, Inc.*, 256 NLRB 130 (1981).

In agreement with the General Counsel, I do not consider the instant matter to raise the dual-motive issues. Nonetheless, it is clear that, whatever characterization may be attached to the case at bar, the analysis of the 8(a)(3) issue remains constant.

Contrary to the Employer, the General Counsel contends he proved the existence of the requisite elements of a *prima facie* case of discrimination. I agree.

(a) There is ample evidence showing each of the alleged discriminatees had been engaged in protected activities. Thus, conversations regarding their working conditions and possible unionization were initiated at the June 21 picnic. The record shows the impetus for further consideration of unionization emanated from those conversations.

Two further meetings among the alleged discriminatees, together with other employees, were held the following week. Those discussions culminated in a vote to seek unionization. One of the discriminatees (Cossey) was designated to make contacts with an appropriate labor organization.

Further, I conclude the totality of the record justifies a conclusion, which I make, that each of the discriminatees played a significant part in the organizing efforts though some, such as Cossey and Lane, were more active than others.

(b) I conclude that the evidence demonstrates the Employer, specifically, Gadoury, was imbued with knowledge of the employees' protected activity.

I have observed, *supra*, there is no direct evidence that the organizing activities were reported to Gadoury. Thus, the General Counsel claims the record evidence warrants an inference that the Employer knew of those activities.

The General Counsel argues several factors militate in favor of making the inference of knowledge. Those factors include (1) Gadoury's agreement to meet with the employees to discuss or iron out shop problems;[26] (2) Gadoury's June 28 threat issued in response to Cossey's question as to what would happen if the employees unionized; (3) the likelihood that Gadoury's wife would have told him that Ms. Cossey had indicated the employees voted to have a union; and (4) the employees' protected activities could not have escaped Gadoury in view of the small employee complement.

The General Counsel's arguments are persuasive. Most noteworthy is Gadoury's June 28 discussions with the Cosseys. I find these illuminate Gadoury's knowledge of what his employees were doing. As noted, Gadoury made the unlawful threats to Cossey in the context of an inquiry as to what would occur if the employees unionized. Arguably, Gadoury's threats on that date amount to severe rhetoric not based on his possession of information, or suspicion, that the employees were actively engaged in organizing. However, Gadoury's June 28 remarks cannot be viewed in isolation. Thus, during that same conversation he recognized the employees had work-related problems when he agreed he would meet with them. If merely such rhetoric (their unlawful character aside), Gadoury had no reason to repeat his threats on July 9 at the timeclock.

Ms. Cossey's discussion with Gadoury on June 28 certainly gave Gadoury reason to, at least, suspect the employees were engaging in protected activity. Analysis of their entire discussion shows a change from their earlier discussions from general to specific. The two of them had earlier discussed the pros and cons of unions without specific reference to the instant Employer. However, on June 28, Ms. Cossey tried to show Gadoury that some union could be good for his company. Gadoury, too, was specific. He undertook a detailed explanation of the position of the Burlington facility as a tax writeoff.

Finally, I find it implausible that Gadoury's wife did not convey to him the knowledge she received from Ms. Cossey that the employees had voted for a union. In this connection, I note that Ms. Gadoury was not called to testify. Her absence from the hearing is unexplained. It is important in two respects. First, Ms. Gadoury's failure to testify enhances the credibility of Ms. Cossey. The latter's claim she made mention of the union vote stands uncontradicted. Second, I consider Ms. Gadoury's failure to testify an appropriate basis for inferring that, had she testified, such testimony would have been adverse to the Employer. Although Ms. Gadoury cannot strictly be said to be within the Employer's control as a managerial official, the personal affinity between Gadoury and his wife creates a reasonable presumption it would not have been unduly burdensome or unreasonable for her to appear as a witness on the Employer's behalf.[27] Accordingly, I

[26] Gadoury, during cross-examination, acknowledged his awareness that the employees had problems that they wanted to discuss with him. He did not deny he had offered to meet with them.

[27] I am mindful that Ms. Gadoury disclaimed any responsibility for telling Gadoury about the employees' vote. However, on balance, I have afforded more probative value to Ms. Cossey's testimony, under oath in my presence, than to Ms. Gadoury's self-serving exculpatory June 28 exclamation, because of her failure to testify.

find it probable that Gadoury learned of the employees' vote for unionization at some time between June 28 and the date he terminated the alleged discriminatees.

Finally, that there are only approximately 10 production employees at the Burlington facility is, indeed, a basis for making the inference of knowledge. The Board's so-called small plant doctrine is extant. Its application herein is exceedingly appropriate. In a case involving 42 workers the Board, not long ago, used that respondent's "small plant" (in part) to infer that the employer had knowledge of union activities. See *Syracuse Dy-Dee Diaper Service*, 251 NLRB 963 (1980).

Finally, Gadoury's very character and management style provides yet another basis for inferring the Employer's knowledge of the employees' protected activities. In the witness chair, Gadoury impressed me with his intelligence. He was alert. His descriptions of his management style show he possesses a keen interest in what occurred in the shop. He personally entertained employee complaints, exhibiting this interest by agreeing to meet with the employees. Clearly, he was fully aware of the Employer's relevant financial matters.

It is difficult to imagine that Gadoury would not have made efforts to acquaint himself with what was going on among his employees when faced with the June 28 conversations with the Cosseys and his own promise to meet with the employees about their problems.

Upon all the foregoing, I conclude there is substantial evidence on which to base the inference, which I make, that the Employer, through Gadoury, had knowledge of the unionization efforts of the alleged discriminatees at all material times.

(c) The record contains cogent evidence of requisite antiunion motivation. Principally, this evidence is derived directly from Gadoury. I have found Gadoury twice threatened employees with discharge and plant closure. In making those statements, he explicitly related it to the advent of a union. I conclude Gadoury's threats, in the context in which uttered, suffices to conclude, as I do, that this element of the General Counsel's *prima facie* case has been established.

There are other factors which support this conclusion. Thus, Gadoury made no attempt to directly refute the statements attributed to him by Ms. Cossey that unions in general, and particularly the one at the Employer's Cleveland location, were a "pain in the a—." I concede Gadoury was entirely free to have an adverse personal view of unions. Nonetheless, to express those views while simultaneously issuing unlawful threats of reprisal for engaging in union activity is some evidence of discriminatory motivation.

Also, Gadoury's failure to deny his statement that the Burlington facility was considered by the Employer as a tax writeoff may be appropriately considered in assessing motivation. Such a statement, in response to an employee's question (Cossey, on June 28) concerning the consequences of unionization, bears the implication that the plant at which the subject employee is working is expendable. When coupled with the unlawful threats, made during the same conversation, the reference to the tax posture of the Burlington facility provides an even more onerous import to the threats. Such meaning supports a conclusion that the Employer, through Gadoury, harbored unlawful hostility toward unions.

Finally, Gadoury's June 28 statement, immediately following the discharge and plant closure threats, that it had already been decided that he and Hamilton would be moved to Cleveland in the event the Burlington facility employees selected a union, tends to show the breadth and extent to which the Employer was prepared to act in the event of unionization. I consider the announcement of such *a fait accompli* yet another element which establishes the antiunion motivation.

(d) The requisite element of adverse personnel action is clear. Although the Employer's answer to the complaint denied that the five alleged discriminatees had been discharged on July 30, no evidence to refute their claim that each had been so terminated was adduced by the Employer. In fact, Gadoury admitted he discharged the employees on the stated date. Accordingly, I find this element of a *prima facie* case present herein.

Upon the foregoing discussion concerning the General Counsel's burden of proof, I conclude and find that a preponderance of credible evidence exists herein which, in its entirety, establishes the presence of all elements of the requisite *prima facie* case on behalf of the General Counsel.

I turn now to the Employer's burden of proof. A fair assessment of the evidence leads me to conclude the proffered defense is pretextual.

Gadoury testified he decided to, and did, discharge the alleged discriminatees because they would not disclose any information concerning pulling of the valve stem of Hufnagel's automobile wheel.[28] In offering this reason, Gadoury explicitly testified he did not suspect any of them as having caused that damage. Thus, he testified "the reason I called the five individuals is because they took their break in that area all the time, and I thought maybe they knew who had done it or saw who had done it." At another point in his testimony, Gadoury asserted "I didn't suspect it was one of the five, I thought it was that they had seen who done it."

As previously reported, Hufnagel is supposed to have told Gadoury that he (Hufnagel) thought it was Lane who pulled the valve stem. Interestingly, Hufnagel did not testify. His failure to do so remains unexplained.

The record reveals that, to the time of hearing, no one had come forward with information concerning who inflicted the damage to Hufnagel's vehicle, and no Employer official had any knowledge of who did it.

Gadoury sought to justify his suspicions over the damage. Thus, he referred to the following incidents involving the alleged discriminatees: Lane and Sementilli were warned about smoking marijuana on the Employer,s premises in the summer of *1979*; late in 1979, Lane kicked a hole in the plant bathroom wall, and was orally warned against such intemperate acts by Gadoury; Lane was *suspected* (Gadoury acknowledged he had no proof) of having broken into a cigarette machine on the Employer's premises, sometime in early 1980 but Gadoury took no disciplinary action whatsoever; at some

[28] The parties stipulated that the Employer's records contain no documentation of the reason for the discharge.

unidentified time, Gadoury testified someone had thrown rocks at the Employer's building, that he never saw anyone do so but that he knew "they (alleged discriminatees), were doing it" and that he "just got the feeling." No disciplinary action was taken; at an unspecified time, Gadoury observed Calp throw washers and bolts in the Employer's building. Gadoury orally asked Calp to stop such activity. That conduct ceased. Gadoury took no further action; for several months before his July 30 discharge, Cossey developed an almost daily history of tardiness for which Gadoury frequently warned him might lead to discharge. Additionally, the Employer's brief cites the September 16 discharge of Sementilli, Calp, and Cooke for having left work early as another element of Gadoury's suspicions of the alleged discriminatees regarding the valve stem incident.

Apparently, all the above references to previous misconduct were designed to demonstrate a propensity among the alleged discriminatees to engage in destructive acts.[29]

Viewing Gadoury's testimony in a light most favorable to the Employer, I conclude it is without substance. Gadoury's response to the report of the damage of Hufnagel's vehicle is unreasonable, illogical, and contrary to his own prior mode of discipline.

Hufnagel's belief, purportedly relayed to Gadoury, that Lane damaged Hufnagel's vehicle, reduced or eliminated a need to confront *all* five alleges discriminatees. Lane, alone, would have been sufficient for purposes of Gadoury's initial investigation.

In the alternative, the situation dictated that Gadoury hold private and individual conferences with the employees. A joint conference designed to achieve Gadoury's stated purpose of eliciting information tends to produce a more inhibiting effect on the participants than separate interviews. This logic found expression in Lane's comment to the effect Gadoury should not expect him to "rat" on his friends, then standing together in the midst of Gadoury's inquisition.

Furthermore, to have selected these five individuals based on their associaion at work and socially, looms as unreasonable in the circumstances herein. I concede it is possible that the interrelationships among the alleged discriminatees could cause one to wonder whether one or more of them had instigated any other to commit the valve stem incident. Notwithstanding this possibility, the patently frivolous and strained nature of the defense in its totality, which will be further explicated *infra*, removes this approach from serious consideration.

I consider Gadoury's references to the former misconduct (or alleged misconduct) described *supra*, a strained effort to fabricate a valid defense. As noted, the reasons for the discharges had not been documented in the Employer's records. This situation provides wide latitude in presentation of the defense. There is no logical or reasonable reason to allude to the prior misconduct. As noted, none of these events is offered as a reason for the discharges. Thus, to interject such evidence may serve two purposes: First, that evidence, at least *by implication*, comprises part of the reason for the discipline. It addresses the aspect of the degree of discipline: discharge. Second, such evidence may be considered to determine the reasonableness of Gadoury's choice in selecting these particular employees for immediate interrogation concerning the damage to Hufnagel's vehicle.

I consider the first postulation suggestive of a presentation of shifting reasons for the discipline. Thus, the first such reason presented is the employees' failure to provide a confession or information to Gadoury. The second such reason is that punishment was warranted because of the previous offenses. Such shifting of defenses, alone, is some evidence that the Employer's defense is spurious. *Greyhound Taxi Co., Inc.*, 234 NLRB 865, 880 (1978), and cases cited at fn. 33. Moreover, references to the misconduct for the second purpose shows frailty of the defense because many of those offenses were either not proved to have been actually committed by the alleged discriminatees (e.g., the damage to the cigarette machine and the rock-throwing incidents) or were condoned (September 16 discharges of Sementilli, Calp, and Cooke, after which they were reinstated during the picnic).

Most of the prior "misconduct" resulted in no more than oral reprimands. The failure to impose discipline more stringent than oral reprimands and warnings is in sharp contrast to the harsh termination impose on the alleged discriminatees on July 30. Indeed, in explaining why he took no action on the cigarette machine damage, Gadoury testified it was "because its difficult to prove that, you know, who done it." Clearly, the valve stem incident was no easier to prove. To this day, the Employer has no knowledge of who committed the damage.

I am satisfied the Employer has provided no satisfactory explanation for Gadoury to have digressed from his prior practice of imposing discipline, and conclude his discharge of the alleged discriminatees is at such variance with his previous procedure as to leave a wide gap in the Employer's defense.

In the context of my findings of the presence of antiunion motivation, *supra*, I am not convinced the Employer has demonstrated a valid reason for the uniform, swift, and harsh discipline imposed on all the discriminatees. It is more plausible that Gadoury's reaction was based on his knowledge that they were leaders[30] in unionization efforts. This knowledge, coupled with Gadoury's union animus, and the fact no reasonable basis had been shown for Gadoury to have effectuated the discharges, shows that the Employer has not sustained its burden of proving it would have discharged the discriminatees even in the absence of their protected activities.

There are other factors which lead me to the conclusion the Employer has not sustained its burden. These factors are:

[29] Interestingly, none of this misconduct is explicitly claimed to be a reason for any of the discharges.

[30] Gadoury's reference to the discriminatees as "ringleaders" is not unlike the term "troublemaker." The latter term has an established meaning in the annals of labor relations. It is a term applied by employers to individuals who are attempting to enlist other employees into engaging in union or concerted activity. *Garrison Valley Center, Inc.*, 246 NLRB 700, 710 (1979); *Passaic Crushed Stone Co., Inc.*, 206 NLRB 81, 85 (1973). Herein, it has not been demonstrated that the alleged discriminatees acted together in any way regarding any of the former incidents of misconduct. Thus, herein, I conclude the use of the word "ringleaders" is a reference to the union activities of the alleged discriminatees.

(1) The discharges are contrary to sound business practice: No evidence was presented to show any dischargee's work performance was poor. Lane was the most experienced production employee. Gadoury acknowledged that Sementilli, Cossey, Calp, and Cooke all produced good quality work. On the other hand, the discharges effectively eliminated approximately one-half of the Employer's production complement. The record reflects that their replacement consumed 1-1/2–2 weeks,[31] and entailed some expense to the Employer.

(2) Gadoury's "investigation" of the valve stem incident was superficial: As previously observed, Gadoury formerly imposed discipline upon employees only after he was sure of the identity of personnel involved in derelictions. In contrast, Gadoury's efforts to make such identification in the valve stem incident clearly was shallow. Thus, he confronted the five dischargees with only Hufnagel's naked assertion he *thought* it was Lane who pulled the valve stem. Gadoury made no independent inquiry of any other employee until *after* he had imposed the discharges. This latter inquiry was not extensive. Admittedly, he spoke with only two other employees, at best.

This sequence of events reflects that Gadoury was not sincerely interested in obtaining the very information, the refusal of which he claims caused the discharges. Moreover, his precipitous reaction to the dischargees' failure to accede to his request for information supports the conclusion that the proffered reason was not the true cause of the discharges.

All the foregoing shows that the discharges were effected without serious investigation and constituted a deviation from the Employer's past practice in dealing with employee infractions, particularly property damage. The question is: What is it that distinguishes the valve stem incident from such activities as rock throwing and cigarette machine damage? Each of the latter problems occurred *long before* the June 21 picnic. It was on that date that the employees' protected activity began. I conclude the record, as a whole, contains substantial evidence to warrant a finding that the distinguishing characteristic was the interjection of the employees' protected activities which motivated their discharge. Thus, it is plain that property damage became intolerable only after the employees had started their union activity. In this backdrop, the discharges are unlawful in violation of Section 8(a)(3). *N.L.R.B.* v. *Electric City Dyeing Co.*, 178 F.2d 980 (3d Cir. 1950), enfd. 79 NLRB 872. I so find.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. C-E Cast Equipment-Furnace Systems, A Division of Combustion Engineering, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Employer, through Gadoury on June 28 and July 9, 1980, unlawfully threatened employees with discharge and plant closure, in violation of Section 8(a)(1) of the Act.

3. Respondent unlawfully discriminated against its employees in violation of Section 8(a)(3) and (1) of the Act by discharging employees M. Calp, R. Cooke, D. Cossey, G. Lane, and G. Sementilli on July 30, 1980, because they engaged in union activities.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found the Employer violated Section 8(a)(3) and (1) of the Act, I shall recommend it cease and desist from engaging in such conduct in the future and affirmatively take such action as will dissipate the effect of its unfair labor practices.

In cases of discriminatory discharges, the Board normally requires the offending employer to offer immediate and full reinstatement or substantially equivalent employment, to the dischargees, and to make them whole. Apparently conceding the lawfulness of the instant Employer's cessation of production operations at the Burlington facility in December 1980, the General Counsel's brief states "that reinstatement would not be required." Instead, the relief requested is entry of a make whole provision, that the Employer's records be purged of references to the subject July 30 discharges, and that the Employer be required to provide each discriminatee with a favorable letter of reference containing the job qualifications and ability of each.

It is true the record contains no evidence reflective of any illegality relating to the termination of the Burlington production operations such unlawful conduct is alleged in the complaint. Nonetheless, I disagree that the recommended Order herein need not contain some requirement regarding reinstatement. An administrative law judge, in *Hurst Performance, Inc.*, 242 NLRB 121 (1979), omitted a reinstatement provision because the plant involved therein had been permanently closed. The Board modified the recommended remedy by ordering the creation of a preferential hiring list. (242 NLRB 121, fn. 2.) The instant Employer is still in business. It maintains more than one operating facility. Reference has already been made to its Cleveland, Ohio, location. Its counsel are situated in another of the Employer's facilities in Windsor, Connecticut.

In the above-described circumstances, I deem it necessary to provide the maximum relief to which the discriminatees are entitled. Accordingly, the Employer shall be ordered to establish preferential hiring list, in nondiscriminatory manner, such as seniority, upon which will be placed the names of each of the discriminatees who had been unlawfully discharged on July 30, 1980, and, if the Employer ever resumes operations within the Burlington, New Jersey, area, the Employer shall offer reinstatement to those employees to their former or substantially equivalent positions of employment, in their relative positions on such preferential lists, before offering such positions to any other individuals. Also *Electrical Products Division of Midland-Ross Corporation* v. *N.L.R.B.*, 617 F.2d 977 (3d Cir. 1980).

[31] I discount Hamilton's claim that work was slack around the discharge time because the Employer presented no evidence to show it had any layoffs under consideration at any time material herein.

The recommended Order shall also require the Employer to make whole each of the discriminatees for any loss of earnings he may have suffered as a result of the discriminatory discharge, by payment of a sum equal to that which each would have earned, absent the discrimination, to the date the Employer ended its production operations at the Burlington location in December 1980. Loss of earnings shall be computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

As noted, the parties stipulated no documentation could be found of the reasons for the various discharges. It is, however, unclear whether the terminations of the dischargees are somehow characterized somewhere in the Employer's records as voluntary or involuntary or, in some other way, reflect that the dischargees ended their employment under any but favorable conditions. Accordingly, I find merit to the General Counsel's request that "any references to the discharges" be deleted. Thus, the recommended Order shall require the Employer to expunge from all of its official records any references which indicate that the dischargees were discharged or in any other way left their employment involuntarily.

No case has been cited to support the request for a favorable letter of reference. My independent research on this subject has not uncovered such precedent. However, there is precedent which I consider analogous and useful. Thus, in *Suburban Ford, Inc.*, 248 NLRB 364, 365 (1980), the Board ordered an employer not to tell prospective employers, or reference seekers, that discriminatees had been discharged for cause. In *I. T. O. Corporation of Baltimore*, 255 NLRB 1050 (1981), the Board ordered an employer to refrain from referring to the unlawful discharges to any other employer, prospective employer, or character or reference inquiry. Finally, in *H. C. Smith Construction Co.*, 174 NLRB 1173, 1177 (1969), the Board adopted the recommendation that an employer who discharged an employee for engaging in protected concerted activity be ordered to send a letter to the discriminatee advising him his eligibility for reemployment.

Although the letter required in *H. C. Smith* was to be a substitute for an immediate offer of reinstatement, I perceive parallels in rationale (as well as the rationale of the *I. T. O.* and *Suburban Ford* cases) to the case at bar. Thus, it appears the cited portions of the remedies in those three cases were predicated upon a need to assure the discriminatee of maximum security for future employment.

Such a need is no less compelling herein. As noted, there is no documentation of the reasons for the terminations in the Employer's records. The requested letter will deter manipulation of those records. Though there is no evidence the Employer is wilfully prone to insert mischaracterizations into its records, the current absence of any documentation whatsoever leaves open the possibility that erroneous information could be inserted, even if by some inadvertance, and then used as a source for job referral. I perceive the General Counsel's request to provide the strongest restraint upon such an occurence.

Additionally, the record shows Gadoury was inclined to assist employees in search of replacement employment. He was responsible for obtaining Johannes' new job. Also, Gadoury made positive testimonial assertions that each of the dischargees' work product had been good.

In other circumstances, it may well be argued that to provide a letter of recommendation to the dischargees gives them an advantage over, and greater rights than, other employees against whom the Employer practices no discrimination. Gadoury's assistance to Johannes, I conclude, dispels such a contention herein. Indeed, I consider that assistance demonstrates that the omission to provide the dischargees with a letter of recommendation would deprive them of a privilege which demonstrably had been granted to nondiscriminatees.

Moreover, Gadoury's testimonial evaluation that the dischargees' quality of work was satisfactory would be without an assured means of dissemination without the letter of recommendation. Indeed, it is not uncommon that terms of settlement, in both litigated and nonlitigated unfair labor practice cases before the Board, contain provision for such a letter.

Section 10(c) of the Act charges the Board with the duty to take "such affirmative action . . . as will effectuate the policies of this Act." (29 U.S.C. § 160(c).) The quoted statutory language has been interpreted as giving the Board broad discretion to define and develop the appropriate remedial means to attain this end. (E.g., *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177 (1941).) In my view, the peculiar circumstances herein comprise an appropriate vehicle for the Board to exercise its remedial discretion in a manner consistent with the General Counsel's request.

Accordingly, I shall recommend the Order contain a provision requiring the Employer to provide a letter of recommendation to each discriminatee; and that the letter shall contain the inclusive dates of employment, his job title, a true and nondiscriminatory statement of his work performance, and a statement that he would be rehired by the Employer upon request in the event production operations resume in the Burlington area. The letter of recommendation shall contain no reference to the instant proceedings and shall not reflect that any dischargee ended his employment involuntarily.

Finally, the recommended Order herein shall require the Employer to refrain, in any like or related manner, from engaging in the conduct found unlawful herein. No evidence was presented, nor is it argued any is contained in the record, which reflects the Employer has a proclivity to violate the Act or engage in such egregious conduct as to warrant the Board's broad proscriptive language. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

Upon the above findings of fact, conclusions of law, the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[32]

The Respondent, C-E Cast Equipment-Furnace Systems, A Division of Combustion Engineering, Inc., Burlington, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening to close its plant and discharge its employees if they bring a union into their shop.

(b) Discriminating against any of its employees because they engage in union activities.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of any of the rights guaranteed to them in Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Establish a preferential hiring list, following a nondiscriminatory system, such as seniority, which includes the names of Melvin Calp, Ron Cooke, David Cossey, Gary Lane, and Gerald Sementilli and, if the Employer ever resumes production operations anywhere in the Burlington, New Jersey, area, reinstatement shall be offered to those employees, in the order their names appear on said preferential list, to their former positions or, if such positions will no longer exist, to substantially equivalent positions of employment.

(b) Make whole each of the discriminatees named in the immediately preceding paragraph, in the manner described above in the section entitled "The Remedy" for any loss of pay or other benefits suffered by reason of their discriminatory discharge on July 30, 1980.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay and interest due under the terms of this recommended Order.

(d) Expunge from all its official records all references which may reflect that each of the discriminatees named above had been discharged or in any other way had their employment terminated by involuntary means.

(e) Within 7 days from the date of this Order, mail to each discriminatee named above a letter of recommendation which will contain the name of said employee, his inclusive dates of employment by the Employer, his job title, a true and nondiscriminatory statement that his work performance was good, and that he would be rehired upon request if production operations are resumed in the Burlington, New Jersey, area. Such letter of recommendation shall contain no reference whatsoever to the instant proceedings, nor shall it contain anything to indicate that the dischargees' termination of employment was anything but voluntary.

(f) Mail to each of the discriminatees named above, and to each other production employee on the Employer's Burlington, New Jersey, facility payroll on July 30, 1980, copies of the attached notice marked "Appendix."[33] (The requirement that the notice be mailed is necessitated by the cessation of production operations at the Burlington facility. I conclude this method is dictated by a need to effectively convey the message contained in the notice. *Amshu Associates, Inc., and Spring Valley Garden Associate*, 218 NLRB 831, 836–837 (1975).)

Accordingly, the "Appendix" shall be prepared by the Regional Director for Region 4 in sufficient numbers to permit mailing to each such production employee. Such notices shall be forwarded by the Regional Director to the Employer. Within 5 days of receipt thereof, the Employer shall mail a copy of the notice to each of its former production employees of the Burlington facility. Upon completion of such mailing, the Employer shall forthwith submit to the Regional Director a list of the names and addresses of the employees to whom the notice was mailed, together with a certification signed by an authorized Employer representative that the Employer has completed the mailing in accordance with the terms of this recommended Order.

Before mailing copies of the notice to the employees designated to receive them, each notice shall be signed by an authorized representative of the Employer.

(g) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps the Employer has taken to comply herewith.

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[32] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[33] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."